

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1572 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE J.R.VORA

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT

Versus

KATHI DARBAR BHIMBHAI BHIKHU- BHAI & ANR

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Appearance :

MR IM PANDYA APP for Appellant

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CORAM : HONOURABLE MR.JUSTICE J.R.VORA

and

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 09/04/2007

ORAL JUDGMENT : (Per : HONOURABLE MR.JUSTICE J.R.VORA)

1 This Appeal is preferred by the State under Section 378 of the Code of Criminal Procedure against the judgment and order delivered by Additional Sessions Judge, Amreli, in Sessions Case No. 171 of 2001, whereby both the accused - respondents herein came to be acquitted for the offences punishable under Sections 302 to read with Section 114 of the Indian Penal Code as well as under Section 37(1) to read with Section 135 of the Bombay Police Act.

2 Brief facts of the prosecution case disclose that deceased Nongha Bechar was looking after the agricultural land of complainant Nathabhai Arjanbhai and his neighbour Dhirubhai Mangroliya. The said land was situated at village Piyava, admeasuring 8 ½ vighas. Deceased Nongha Bechar was looking after the standing crop and was staying at the said field and used to come to the village for his meals, etc. On 15th of January, 1995, at about 8.00 a.m. complainant Nathabhai Arjanbhai visited his land and reached there at about 9.00 a.m. He found that between agricultural land of the complainant and Dhirubhai, dead body of Nongha Bechar was lying and blood was sprinkled around the dead body and had dried. There were injuries on the head of the deceased. Complainant Nathabhai Arjanbhai came back and found that one battery and one quilt were lying in the field along with front portion of a sphere. He then went to Popatbhai Becharbhai, brother of the deceased who was working in nearby field. Popatbhai along with

complainant visited the place where the dead body of Nongha Bechar was lying. According to Popatbhai, before 10 years of incident, Nongha Bechar had a quarrel with the respondents, and in said quarrel, one Kathi Darbar Babu Bhikhubhai had died, and for that, Nongha Bechar was tried and was acquitted. On account of this, present respondents had enmity with the deceased because respondent No.1 happened to be brother of deceased Babubhai Bhikhubhai and according to Popatbhai, they might have caused injuries on Nongha Becharbhai and might have caused death of the deceased. Having so informed by Popatbhai, complainant Nathabhai Arjanbhai filed a complaint showing suspicion upon respondents on 15th of January, 1995 at about 16.45 hours at Outpost at Vanda before Head Constable Babubhai Mohanbhai, who noted the same as occurrence report and registered the offence and made a report to Jesar Police Station In-charge, vide Exhibit-19. The crime ultimately registered before Jesar Police Station being Crime Register No. 6 of 1995 for the offences as mentioned above.

3 The investigation was entrusted to PSI A.S. Kosat. After investigation, charge sheet for the above said offences came to be filed by Police against the present respondents in the Court of learned Judicial Magistrate, First Class, at Savarkundla, and the case was committed to the Court of Sessions at Amreli, which was registered as Sessions Case No. 171 of 2001. A charge was framed by learned Additional Sessions Judge, vide Exhibit-2 against both the respondents on 11th of February, 2004, to which both the respondents pleaded not guilty and, therefore, prosecution examined

as many as 10 witnesses as under :

PW-1 Nathabhai Arjanbhai - Complainant at Exh. 6

PW-2 Sanubhai Virjibhai - Panch witness at Exh.9

PW-3 Alibhai Sajانبhai - Panch witness at Exh. 11

PW-4 Chhothabhai Narsibhai - Panch witness at Exh. 12

PW-5 Popatbhai Becharbhai – Exh. 13

PW-6 Budhabhai Lakhabhai - Exh. 14

PW-7 Malabhai Becharbhai - Exh. 15

PW-8 Babubhai Mohanbhai, Head Constable – Exh. 18

PW-9 Ramjibhai Nathabhai, P.I. Exh.21; and

PW-10 Dr. Ramjibhai Desabhai Parghi, Exh. 38, who conducted the post mortem of dead body.

The prosecution also submitted on record voluminous documentary evidence as well, like complaint, panchnama, Forensic Science Laboratory Reports, etc.

4 After the evidence was over, a statement was recorded of each of the accused by learned Trial Judge under Section 313 of the Code of Criminal Procedure Code and the case of each of the accused was of total denial and, hence, the learned APP as well as learned

Advocate for the defence were heard at length. Ultimately, the learned Trial Judge came to the conclusion that the case rested on circumstantial evidence and those circumstances could not be proved by the prosecution beyond reasonable doubt to connect the accused with the crime.

5 We have gone through the papers entirely and carefully. We have called for Record and Proceedings from the Trial Court which is available to us and we are to greater extent assisted by learned APP with the copies of the documents and evidence. At this stage, we have examined all vital features of the case and all the circumstances appearing in the evidence. We have carefully scanned the evidence of each of the witnesses and have gone through the documents produced by the prosecution.

6 The learned APP Mr. Pandya on behalf of the State vehemently urged that though the case is resting on circumstantial evidence only, but evidence of discovery is amply proved against both the accused. It is also proved according to learned APP that blood stains on the clothes recovered from each of the accused were of 'B' Group while according to the Forensic Science Laboratory Report, blood group of the deceased was 'B' Group and this evidence is sufficient to

connect the accused with the crime and, therefore, appeal requires consideration as the appeal has substance.

7 While going through the evidence, we have appreciated the same independently and dispassionately. PW-1 Nathabhai Arjanbhai - Exhibit-6 is complainant and he deposed almost in terms of his complaint, which is placed at Exhibit-7. Nothing incriminating is coming out of his deposition except a suspicion shown by Popatbhai Becharbhai about the previous enmity between the respondents and deceased about the quarrel took place before 10 years of the incident, in which brother of the respondent No.1 had died and deceased was tried. PW-2 Sanubhai Virjibhai - Exhibit- 9 is a panch witness of scene of offence panchanama at Exhibit -10, through which one front part of a sphere, one pair of shoes, were recovered and sample earth as well as blood stained earth was also recovered from the scene of offence. PW-3 Alibhai Sajanbhai is also a panch witness of panchnama of discovery. It is the prosecution case that accused respondent No.1 Kathi Darbar Bhimbhai Bhikhubhai expressed his wish to show the place of concealment of weapon used in the crime. A preliminary panchnama was drawn and, thereafter, according to the prosecution case, the accused had taken panchas and police near Vijaynagar and from bunch of babul trees, one pipe was taken out by the accused.

However, PW-3 Alibhai Sajanbhai has not supported the prosecution case and he stated that though that panchnama contained his signatures but he subscribed those signatures in gram panchayat office at Village Kada. Except that, he did not know anything and the said panchnama is produced at Exhibit-24. The second panch of that panchnama Manubhai Bachubhai has not been examined. PW-4 Chhothabhai Narsibhai is examined by prosecution at Exhibit-12, and according to prosecution, as per panchnama at Exhibit-23, accused No.2 Kathi Darbar Bhagubhai Ravatbhai expressed his wish to show the place where he had concealed muddamal weapon. According to prosecution case, after drawing preliminary panchnama, accused Ravatbhai led police and panchas near Karadiya Beed and Khodiar Mata Temple and from there accused Bhikhubhai walked for about 200 feet and from removing dust and earth, took out one axe. However, PW-4 Chhothabhai Narsibhai did not support the prosecution case and he was declared hostile and was confronted with the panchnama, but he stated that though panchnama at Exhibit-23 had contained his signatures but those signatures had subscribed by him on road where he had been stopped by police and had been asked to sign some papers. PW-5 Popatbhai Becharbhai is examined at Exhibit-13. He stated that along with Nathabhai Arjanbhai he visited the field of Nathabhai Arjanbhai and found that his brother had been

murdered. He deposed about previous enmity between the accused and Nonghabha on account of a quarrel which had taken place before 10 years between them, in which brother of accused No.1 Babubhai had died, for which the deceased was tried and acquitted. PW-6 Budhabhai Lakhabhai Bharvad is examined at Exhibit-14 and he stated that on the day of incident, he had seen the accused Bhagubhai Ravatbhai at village Piyava. PW-7 Malabhai Becharbhai is examined at Exhibit-15. He is examined for proving the previous enmity between the deceased and the accused, but witness Malabhai Becharbhai did not support the prosecution case. PW-8 Babulal Mohanlal Mehta is examined at Exhibit-18. He was an Unarmed Head Constable serving at Outpost Vanda, before whom on 15th of January, 1995, an occurrence report was filed by complainant. He produced and identified the said occurrence report at Exhibit-7. He also produced on record the report at Exhibit-19 by which he forwarded the complaint filed to Jesar Police Station. PW-9 Ramjibhai Nathalal Bharda is examined at Exhibit-21 and he was the Investigating Officer of the crime, and according to him, during investigation, he draw panchnamas, seized muddamals, draw discovery panchnamas, arrested accused and had forwarded muddamal to Forensic Science Laboratory for examination and analysis. PW-10, Exhibit-38 and last witness Dr. Ramjibhai Desabhai Parghi is examined by the prosecution because he conducted the postmortem on the dead

body of the deceased. According to him, on 15.1.95, at about 8.00 p.m. dead body was forwarded to him for postmortem and on 16th of January, 1995 between 8.00 a.m. and 9.00 p.m. he had conducted the said postmortem. According to him, the deceased had seven external injuries as mentioned in the postmortem note and corresponding internal injuries. According to him, death was caused due to shock and haemorrhage and injuries on the head.

8 This is all the evidence led by the prosecution.

9 Undoubtedly, while scanning and appreciating the evidence on record it is clear that , the case rests on circumstantial evidence only and there is no direct evidence. The Apex Court long back in 1984, in the matter SHARAD BIRDHICHAND SARDA vs. STATE OF MAHARASHTRA, as reported in AIR 1984, 1622, established the principles as to the circumstantial evidence, in paragraphs 152 and 153 of the judgment. Accordingly, the circumstance from which the conclusion of guilt is to be drawn should be fully established and must be consistent only with the hypothesis of the guilt of the accused and should not be explainable on any other hypothesis except the guilt of the accused. The circumstance should be of a conclusive nature and tendency and must be excluding every possible hypothesis except the

one of the guilt of the accused. The chain of evidence must be so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused and accused only. While appreciating the evidence, it appears that there are four circumstances which prosecution has attempted to place before the Court for examination from which the guilt of the accused is to be ascertained, namely, (i) enmity between the parties as to death of brother of accused No.1 in a quarrel, in which the deceased was tried for murder and was acquitted; (ii) on the day of the crime, accused No.2 Bhagubhai Ravatbhai was seen and was present at village Piyava; (iii) discovery of muddamal weapon from the accused at the instance of the accused and (iv) finding of the blood group of the deceased on the clothes recovered from the accused at the time of their arrest and alleged to have been put on by the accused while committing the crime.

10 When we carefully scrutinize the above four circumstances, we found that, circumstances 1 and 2 are not the circumstances at all, from which it can be deduced that directly or indirectly any of the accused was connected with the crime. Mere enmity without any other direct or circumstantial evidence would not follow any motive so as to link the accused with the crime committed. Only because some dispute

had taken place before 10 years or accused No.2 was present at village Piyava, would in no circumstance lead to the conclusion that any of the accused were involved in the crime.

11 So far as discovery muddamal weapons is concerned, both the panchnamas of discovery from accused Nos. 1 and 2 of iron pipe and axe are produced on record. Alibhai Sajanbhai, panch of Exhibit-24 is examined, but he has not supported the prosecution case, while, however, second panch of panchnama at Exhibit-23 has not been examined by the prosecution. Like wise, so far as panchnama at Exhibit-24 about the discovery of an axe from accused No. 2 Bhagubhai Ravatbhai is concerned, PW-4 Chhothabhai Narsibhai is examined, but he has not supported the prosecution case. So far as discovery is concerned from the accused No.2, again second panch of panchnama at Exhibit-24 has not been examined. A panchnama can be proved even by Investigating Officer in absence of panchas not supporting the panchnamas, but in those circumstances, it is the duty of the prosecution to get the panchnama proved from the Investigating Officer as per established law to put some reliance upon such discovery panchnama. When we scrutinize the evidence of the Investigating Officer Ramjibhai Nathalal Bharda at Exh. 21, it appears that, no details of panchnama at Exhibits 23 and 24 is deposed by the

Investigating Officer and even who were the panchas of those two panchnamas and how the accused gave information as per the Section 27 of the Evidence Act has also not been deposed by the Investigating Officer. He deposed to the extent only that in the presence of both the panchas, the said panchnamas were drawn by him. Panchas had subscribed their signatures and he had also signed both the panchnamas. In these circumstances, no reliance can be placed on the circumstance relied upon by the prosecution of the discovery of muddamal pipe from accused No.1 and muddamal axe from accused No.2. These circumstances, therefore, would not be said to have been proved beyond doubt by the police.

12 So far as the last circumstance is concerned, it is in respect of finding of same blood group of the deceased from the clothes of both the accused. According to the deposition of the Investigating Officer, i.e. PW-9 Ramjibhai Nathalal Bharvad, the accused were arrested on 18th of January, 1995 and the offence came to be committed somewhere during night of 14th of January, 1995. On 18th of January, 1995 after four days, when the accused were arrested, according to the Investigating Officer, their clothes were containing blood stains. If we put this fact on the anvil of careful scrutiny, it appears clearly that, it is improbable that the accused would have continuously put on the same clothes which

they were wearing at the time of committing the crime for four days. Not only that but this panchnama which is at Exhibit-22, is straightaway admitted in evidence in the deposition of the Investigating Officer and none of the panchas of Panchnama at Exhibit-22 by which the clothes of the accused were recovered has been examined. Needless it is to be observed that it is the panchas of the panchnama, is the substantive evidence and not the panchnama or the officer drawing the panchnama. In this view of the matter, this circumstance of finding of the same blood group i.e. Blood Group-B of the deceased on the clothes of the accused is the weakest kind of evidence to connect the accused with the crime. Otherwise also, on such type of evidence and on this evidence alone in a case resting on circumstantial evidence, it is not safe to base conviction of the accused.

13 This is an acquittal appeal and in acquittal appeals, though the High Court has the same powers of appreciating the evidence and coming to its own finding as the High Court has in appeal against the orders of conviction. At the same time, it must not be forgotten that the order of acquittal cannot be lightly interfered with unless the findings of the Trial Court are so perverse or against the weighty evidence that the same would not stand to reason. This is so because it must be borne in mind that the presumption of the innocence is still available in favour of

the accused and the same stands fortified and strengthened by the order of acquittal passed in favour of the accused by the Trial Court.

14. However, the learned Trial Judge reached to the conclusion of acquittal after assigning the reasons and for the same reasons we have also reached to our independent conclusion that the order of acquittal impugned in this Appeal cannot be interfered with. The reasons given by the Trial Court are justifiable and not at all perverse or against the evidence on record. The judgment and order therefore requires no interference even at this stage also. In this view of the matter, the following order is passed.

“Leave to Appeal is refused. Appeal stands dismissed.”

(J. R. VORA, J.)

(B. N. MEHTA, J.)